



1926

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Recommended Citation

Edwards, Wm H. (1926) "Constitutional Background for State Reorganization I.," *North Dakota Law Review*. Vol. 3 : No. 2 , Article 3.

Available at: <https://commons.und.edu/ndlr/vol3/iss2/3>

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CONSTITUTIONAL BACKGROUND FOR STATE REORGANIZATION. I.

WM. H. EDWARDS*

For the past decade a movement for the reconstruction of State governments has been sweeping the country. It has been promoted, on the one hand, by political scientists and reform organizations, and, on the other, by spoilsmen and economy-politicians. Its purpose, in brief, is to center all political and administrative responsibility in the governor. Its ideal of constitutional structure is the U. S. "federal plan." Unfortunately, this cure-all, like the primaries, the initiative and referendum, the direct election of executive officials, the "federal plan" cities, and commission government cities, has failed to turn the trick and soon will be buried in the potters field of political panaceas. Scandals in the states where reorganization codes prevail are known throughout the land. Illinois, the first to adopt the plan, is only one of them. The eventual breakdown of the codes was apparent from the start. All the while, the political medicine men who conceived the plan have been saying, "Wait, we shall see; it is too soon to criticise." We have been waiting for the past ten years. Is it not yet time to speak? Some leaders of the movement have admitted openly the failure of the scheme; others have not publicly admitted their disillusionment because their books and articles have given them a property right in the movement.

Why has the plan been unsuccessful? In a word, because it has violated almost every elementary principle of politics since Aristotle. It will be considered carefully in historical perspective giving credit where credit is due.** The subject is divided into five main topics (of which only topics 1 and 2 will be considered in this issue):

- (1) The fundamentals of government organization,
- (2) The evolution of U. S. state constitutional structure,
- (3) The history and nature of the state reorganization movement,
- (4) Criticism of the movement, and,
- (5) Prospects for the future.

FUNDAMENTALS OF GOVERNMENT ORGANIZATION.—

A preliminary statement of the basic constitutional principles is particularly useful because promoters of recent reorganization schemes have disregarded or misinterpreted them. Almost all political philosophers, ancient, mediaeval and modern, have classified governments on the basis of the theory of separation of powers. That is to say, the nature of the relationship of certain branches of government (usually the executive, legislative and judicial) has been the key to grouping governments. The classical types arising from variations in the relation of these powers were monarchy, aristocracy, democracy. But in more recent times, governments have been divided into two main categories. In the one the legislative branch is supreme; in the

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** This study will be continued in the next issue of the REVIEW.

other it is not.¹ The relative position of the executive and legislative branches vitally concerns all those who would alter governmental structure.

"The relation of the Supreme Executive to the Legislative organ is one of the knottiest points in constitutional construction; it is variously conceived by different theoretical politicians who agree in accepting the principle of popular control over legislation, and variously determined in different modern states in which a popularly elected assembly is actually a main element of the legislature."²

Recent state reconstruction codes have been advanced by some adherents because the governments would thus be converted from the less efficient check and balance type into the more responsible structure of legislative supremacy. This claim of transformation is to be seriously questioned because they accept as their ideal the U. S. "federal plan" which by no means provides legislative supremacy. Thus the first and most fundamental question to arise is: What of the merits of the two types? What has been the attitude of the leading authorities, past and present, toward them? Strange but true, these two main types of government are both founded upon the same basic constitutional theory—the tripartite separation of powers. Practically all modern constitutions and all American constitutions, city manager charters excepted, are based on this theory. A few political theorists contended that, instead of three separate powers, there should be two, others four, and still others believed that governments are or should be a unified system, and therefore, that there should be no separation of powers.

The classification of governmental powers into three coordinate and equally balanced parts was the arrangement frequently considered to have been conceived full grown in the mind of Montesquieu. But he was by no means the first to propose it. Such ancient philosophers as Aristotle, Cicero and Polybius recognized the doctrine. Aristotle's structure included a deliberative assembly, a system of magistracies and a judicial organ.³ During the Middle Age, the theory was unknown, and it was not until 1377 that the doctrine was again propounded. In that year, Marsiglio of Padua, in his *Defensor Pacis*, distinguished between the legislative and executive powers, the former controlled directly by the people, the latter subordinate to the former. This he said was "according to the truth and opinion of Aristotle."⁴ John Locke divided governmental powers

¹ The first type is signified by such terms as true representative government, parliamentary supremacy, cabinet system (British), controlled executive, responsible government, legislative supremacy. The other is known by such titles as multiples agency system, presidential government, check and balance system, executive government, irresponsible government, non-parliamentary government, judicial supremacy, divide and rule system, monarchical-republic. John Adams defined the U. S. federal plan as a "monarchical-republic." Gettell classifies government into two main types—parliamentary and non-parliamentary government in his, *Introduction to political science*, 174. To H. J. Ford the two main types are—true representative government and multiple agency system; see his *Representative government*.

² Sidgwick, *Elements of politics*, 406.

³ Aristotle, *Politics*, Bk. IV, xiv, et seq.; Dunning, *History of political theories, ancient and mediaeval*, 76.

⁴ Dunning, *op. cit.*, 240; Garner, *Introduction to political science*, 412.

into three divisions, but held the legislative to be predominant over the executive and federative powers.⁵ Montesquieu declared his dependence upon Locke for his ideas regarding the separation of powers. Bluntschli, the German philosopher, in referring to the classical trinity principle, asserted that the legislative stands in a class by itself, that all the other functions of the government belong to the particular while the legislative belongs to the whole body politic. Since the whole is more than its parts, the legislative must inevitably be superior to all the other particular powers.⁶ Thus, it may be reasonably concluded that even among those great philosophers of the past, who devoted themselves to dividing powers of government on a tripartite basis, the dictum of "legislative supremacy" was accepted, and the type characterized by complete independence through fine checks and balances were ignored.

Montesquieu is the one outstanding exception to this general contention that the legislative power should be supreme over all others. But his exception is potent because he was accepted without question by the English speaking people of the Eighteenth Century. Even Blackstone, in his *Commentaries*, copied him and his false interpretation of the British constitution.⁷ Montesquieu was the "oracle always consulted and cited on this subject"⁸ by our Revolutionary Fathers and the Framers of the U. S. Constitution. He assumed the great tradition of British liberty was owing to the structure of their constitution. Perhaps,—but he misinterpreted its structure. He saw the legal fiction of a tripartite balance of powers and failed to see the political reality of a supreme and all-powerful Parliament.⁹ Therefore, he was influenced more by his mistaken interpretation of the British constitution than by his ideal of liberty.

Montesquieu began by accepting Locke's classification of legislative, executive and federative powers. Then he changed the term federative to judicial, ignored the idea of legislative supremacy, and extended the trinity of powers theory to the extreme by declaring that these three general governmental functions should be carried out by three different bodies of officials.¹⁰ These were the mistakes of Montesquieu. He had no idea of a cabinet "the tie which binds and the buckle which fastens" the legislative to the executive organ. In contrast to the other great political philosophers, he favored an organic separation of functions. It was left to his disciples to determine what checks and balances should be adopted to force artificially the separation of one organ from the other.¹¹ Consequently, although many constitutions have been framed on the basis of his doctrine, few if any of them are exactly alike because each constitutional convention has adopted different methods of keeping the "separate powers" separate. Conventions with monarchist leanings give most checks to the executive; those with democratic sympathies favor the legislative in distributing the checks; those with aristocratic

⁵ John Locke, *Two treatises of government*. II, xii, 143-6; xiii. See also, Dunning, *History of political theories*, Luther to Montesquieu, 358.

⁶ Bluntschli, *Algemine Staatsleher*, I, vii, ch. 7.

⁷ Blackstone, *Commentaries on the laws of England*, 17. (Chase ed.)

⁸ *Federalist*, No. 46.

⁹ Dicey, *Law of the Constitution*, 187.

¹⁰ Montesquieu, *Espirít de lois*, Bk. xi, ch. vi; Dunning, *op. cit.*, 413.

¹¹ *Federalist*, No. 46.

tendencies center the controls in the judiciary or the upper house of the legislature.

There are three main conclusions to be drawn regarding the tripartite principle. First, the great philosophers (Montesquieu and his disciples excepted) held the legislative power supreme. Second, constitution framers following Montesquieu often founded entirely different types of government, some of which quickly reverted to legislative supremacy. Third, the types established depended to a great extent on the social desires of the framers.

Certain defects in the trinity theory have led to the establishment of other ideas of governmental powers. The following criticisms are typical: It was never more than a theory and an ideal not to be fully realized in practice.¹² The plurality of powers is inconsistent with the unity of the state. The organic separation of functions is impossible.¹³ It is no more feasible to exercise these separately than it is to exercise the different powers of human beings independently. But, if such separation were practicable, it would, according to Blackstone, have the same tyrannical effect as the concentration of power in one body.¹⁴ Said Rousseau: "They make the sovereign a fantastic being formed of connected parts; it is as if they composed a man of several bodies, one with eyes, another with arms, another with feet, and nothing else."¹⁵ The trouble with the separation of powers doctrine, Woodrow Wilson contended was that government was not a machine but a living thing.

"No living thing can have its organs offset against each other as checks and live. On the contrary its life depends on quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men with highly differentiated functions—but with a common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate coordination of the organs of life and action. This is not theory but fact, and displays its force as fact whatever theories may be thrown across its track."¹⁶

The theory he concluded was successful to the extent it has failed in reality. Proponents of this theory frequently confused separation of authority with separation of function.¹⁷ Unless the theory indicates separation of both authority and function, it is so broad and elastic that it is worthless as a practical rule. The absolute independence of the departments is impractical because deadlocks arise and inefficiency is the consequence. This inefficiency outweighs the advantages of independence.¹⁸ And, when it is realized that the chief

¹² Goodnow, *Politics and administration*, 11-12, and *Principles of administrative law*, 3; Bondy, *Separation of powers*, 117; Treitsche, *Politik*, II, 3.

¹³ Esmein, *Droit Constitutionnel*, 369.

¹⁴ Garner, *op. cit.*, 421.

¹⁵ Rousseau, *Social contract*, Bk. II, ch. 2.

¹⁶ Wilson, *Constitutional government in U. S.*, 56.

¹⁷ Duguit, *Droit constitutionnel*, 319; Cooley, *Principles of constitutional law*, 44.

¹⁸ Mill, *Considerations on representative government*, 82.

argument for the separation of powers, namely, the preservation of liberty, is false, then there is little left to justify the theory.¹⁹ In reality, there is never an equal balance of powers. There may be a multiplicity of organs but normally one will predominate, and, instead of powers being equal, they will assume the character of a hierarchy. And, from the very nature of government, it is the legislative branch that tends to become supreme.²⁰

Many critics of the tripartite idea have accepted the dual theory of parliamentary powers which has developed chiefly in America and France. In America, Thomas Paine and Benjamin Franklin advocated this idea during the revolutionary period, and recently F. J. Goodnow, President of Johns Hopkins University, has led a considerable following. In France, Rosseau, DuCrocq and Duguit adopted the theory. Paine's conception evolved from a fundamental belief in democracy and a supreme contempt for the British constitution. He contended in *Common Sense* "that the English constitution is a union of three powers reciprocally checking each other is farcical; either the words have no meaning or they are a flat contradiction The English constitution (is) a house divided against itself."²¹ In the *Rights of man*, he maintained, "We can perceive no more than two divisions of power, namely, that of legislating or enacting law and that of executing or administering them."²² In writing *Of Constitutions governments and charters*, he declared:

"The general defect in all (American state) constitutions is that they are modelled too much after the system, if it can be called a system of the English government, which is the most corrupt system in existence for it is corruption systematized. An ideal also generally prevailed of keeping what were called the legislative, the executive and the judicial powers distinct and separated from each other. But this idea . . . is always contradicted in practice; for where . . . a governor or executive can by a negative prevent an act of the legislature becoming a law, he is effectually a part of the legislature and possesses full one-half of the powers of a whole legislature"

"When we see maxims that fail in practice, we ought to go to the root and see if the maxim be true. Now it does not signify how many nominal divisions, and subdivisions and classifications we make, for the fact is there are but two powers in any government, the power of willing or enacting the laws and the power of executing them; for what is called the judiciary is a branch of the executive power"²³

The statements in Paine's *Dissertation on first principles of government* express Dr. Goodnow's attitude:

"The former (the power of willing) corresponds to the intellectual faculties of the mind which reasons and determines what shall be done; the second (the power of executing) to

¹⁹ Crane and Moses, *Politics*, 197; Gettell, *Introduction to political science*, 228.

²⁰ Goodnow, *Comparative administrative law*, I, 31; Bluntschli, *op. cit.*, Bk. vii, ch. 7; Storey, *Commentaries*, secs., 534, 542.

²¹ The political writings of Thomas Paine, I, 22. (2 vols., Boston, 1859).

²² *Id.*, II, 191.

²³ *Id.*, I, 456-7.

the mechanical powers of the human body that puts that determination into practice The executive department is therefore official and is subordinate to the legislative as the body is to the mind for it is impossible to conceive of the idea of two sovereignties, a sovereign to will and a sovereign to act."²⁴

This theory as outlined by Paine, is elaborated in detail by Dr. Goodnow in his book *Politics and administration*. He begins by saying, "The action of the state as a political entity consists either in operations necessary to expression of its will or in operations necessary to the execution of that will."²⁵ The French dualists, including Duguit and Pradier-Fodere, have expressed the same view that "There can be but two powers: *La Puissance legislatif et la puissance executif*."²⁶ All actions of the state or its organs must be in these two fields. To quote M. DuCrocq: "The mind can conceive of but two powers: that which makes the law and that which executes it. There is no place for a third power by the side of the first two."²⁷ According to Rousseau:

"The body politic has the same motive powers (as the individual) . . . force and will, the latter under the name legislative power, the former under the name executive power. Nothing is or ought to be done in it without their cooperation. The legislative power belongs to the people and can belong to it alone The executive power cannot belong to the people because the power is executed only in particular acts."²⁸

In his trinity theory, Montesquieu not only recognized the separate functions of government but also the existence of separate government authorities and the exercise of one of the powers by each authority. This idea, Dr. Goodnow indicated, was carried farther in the United States than even Montesquieu intended and therefore was unworkable.²⁹ Dr. Goodnow contended that "the will of the state must be made up before the act" and that popular government exists to the extent that the executing body is subordinate to the deliberate body.³⁰ This relationship is necessary in popular government because the legislature "in the nature of things can be made much more representative than can the executive authority."³¹ In the United States, thanks to the Montesquieuan theory, the legislature is not supreme but subordinate to the executive. Owing to this situation, Dr. Goodnow maintains that the powerful political party has developed, in lieu of the legislature, which "busies itself as much with the election of administrative officials as it does with the election of bodies recognized as distinctly political in character."³² Thus the political machine, carrying in its wake, spoils corruption, patronage, is necessary in

²⁴ *Id.*, II, 342.

²⁵ Goodnow, *Politics and administration*, 9.

²⁶ Duguit, *La separation ses pouvoirs*, 73-4; Pradier Fodere, *Precis de droit administratif*.

²⁷ DuCrocq, *Trait de droit administratif*, I, 29; *Cours de droit administratif*, I, 26.

²⁸ Rousseau, *op. cit.*, Bk. III, ch. 1.

²⁹ Goodnow, *op. cit.*, 12.

³⁰ *Id.*, 10, 24.

³¹ *Id.*, 24.

³² *Id.*, 25; Ford, *Representative government*, 240.

America to make the government workable. It is a blessing in disguise—a refuge from chaos. Incidentally, the writer questions, whether a state reorganization code, which still further enhances the power of the executive over the legislative branch, is going to relieve our political pains.

For our purposes, the chief significance of the dualist theory is that the trinity dogma is their object of attack and that legislative supremacy is their ideal type of government.

The outstanding objection to the dualist theory is that "it too readily accepts a distinction of individual psychology as a standard for classification. 'Will' and 'act' are taken from use relating to individuals and applied to the state where we are told it exists in a more distinct form than in the individual."³³ Although Dr. Goodnow concedes that the details of will expression are worked out by the executive, critics claim that will determination on the part of the administration makes the theory void; that general rules do not always precede individual acts; that the latter may precede the former or may occur without leading to a general law. The blanket criticism has been laid against this as against other theories of powers that there is no theory that will serve to define the actual work of the various governmental agencies. But, in spite of these objections, there is much to be said for the dualist idea.

In addition to the dual and tripartite theories, it has been suggested at times that there are or should be four separate powers. The constitutions proposed for South America, by Miranda and Bolivar carried provisions for a fourth power. This moral power served the important legislative function of watching, supervising and checking the other three branches. In recent years, as a result of the extension of the administrative functions, it has been contended that there are in reality two powers within the executive branch, one actually executive and the other administrative. Since the idea of four powers has carried little weight, the theory will not be analyzed further.

In England, the rejection of the Montesquieuan theory led not to dualism but to the unitary idea of representative government. With the rise of the Utilitarian school in that country, the separation theory was demolished. Jeremy Bentham, the noted English lawyer and leader of the Utilitarians, condemned the check and balance theory of the British constitution as formulated by Blackstone. James Mill also argued that the theory was worthless as a security for good government, and that the only hope was in the establishment of representative government. It was left for John Stuart Mill to write the classic treatise, *Considerations on representative government*. He completely discarded the separation theories and maintained that—"a balanced constitution is impossible . . . There is in every constitution a strongest power . . . one which would gain the victory, if . . . there came a trial of strength . . . This in England is the popular power . . . for it has substantial supremacy over every department of the government . . . (It has) control of everything in the last resort."³⁴ If the advocates of "representative government" were inclined to think in terms of "powers," their conception of government structure would be almost identical with the dualists. The late Henry Jones Ford, one of

³³ Bentley, *The process of government*, 327-8.

³⁴ Mill, J. S., *Considerations on representative government*, 97-100.

the principal proponents of the unitary idea in America, laid down the following fundamental conditions for "true representative government:"

"1 . . . the people shall be free to choose whom they will to represent them.

"2 . . . the representative assembly shall be face to face with the administration.

"3 . . . the representatives shall be so circumstanced that they can use their authority only on public account.

"4 . . . elections shall be confined to the choice of representatives (in the legislature).

"5 . . . supervision and control of the representative assembly shall extend over the whole field of government."³⁵

Dr. Ford in speaking of the half-truths of Montesquieu's doctrine, contended—"the organ of administration and the organ of control ought to be separately constituted, but the separateness that is essential to their functional activity cannot be realized in practice unless they are directly connected in their operation." Unless the organ of control (the legislature) is connected with the administration, the former "sinks in character and ability," representative institutions are degraded and general political corruption follows.³⁶ Thus the proponents of the unitary idea of representative government agree with the dualists and the large number of trinitarians in rejecting the dogma of an equipoise of powers and in accepting the practical principle of supremacy of the representative body.

The general conclusion on this topic of the fundamentals of government organization is that legislative dominance is the one fundamental fact upon which all of the great political philosophers and authorities on constitutional construction, (with the exception of Montesquieu and his followers) are agreed. Contrary to this almost unanimous agreement, the state reorganization movement proposes to further increase the independence and control of the executive over the legislative branch.

EVOLUTION OF U. S. STATE CONSTITUTIONAL STRUCTURE.—Since the exact type of constitutional structure depends upon the purposes of the framers, it is necessary to understand their ideas of the manner in which governments should serve society.

"On the divergence of form and function in these three elements depends the character of the various constitutions. It is because these divergencies are practically infinite in number that the forms of constitutions shade imperceptibly from one to another of the prominent types."³⁷

The main idea at the time of the framing of the first American constitutions was that government was a necessary evil to be feared and hedged at every turn, and, therefore, the government should be restricted and its powers circumscribed to prevent abuse. Hence, the various organs should check and balance each other to prevent oppres-

³⁵ Ford, *Representative government*, 158; see also Ford, *Cost of our national government*.

³⁶ *Id.*, 181-184; see also Ford, "Causes of political corruption," *Scribner's Magazine*, XLIX, 57, (Jan. 1911).

³⁷ Dunning, *History of political theories, ancient and mediaeval*, 76.

sion by the king and his overlords, by arbitrary acts of dictators, demagogues or what-not.

The tendency at the present time, on the contrary, is toward conceiving of government as a highly desirable institution for society, and that, therefore, its services should be utilized to the utmost in the interests of social well being. Consequently, the demand arises for government by competent technicians and administrators unhindered by checks and balances—a government ordained from the sole viewpoint of competency in a broad sense. This by no means necessitates the discovery of a body of supermen to whom will be delegated complete powers of government and to whom will be handed over the reins of government forever. Obviously, efficient government cannot be secured in this way. The various social and economic groups must contribute their fund of knowledge to the whole in order to solve the problems of society. Although the expert technicians cannot perform their work unaided, their service is essential for "the entire business of government is skilled employment."³⁸

In short, to those who see government as an institution to be endured but not encouraged, it is only natural to accept the Jeffersonian postulate that the *least* government is the best. But to those who feel that government is essential to social welfare the dictum is altered to read, the *best* government is the best, or as Pope has said: "For forms of government let fools contest what ere is best administered is best." The tendency seems to be toward the latter point of view. It is toward casting off any inborn fear and superstitious attachment to a form of government which was conceived many years ago for the purpose of warding off possible oppression. We are beginning to think of good government not as protection against tyrants but as services realized on money invested through taxes.

The question now arises: Is it necessary to discard an old constitutional structure, built to suit the needs of people centuries ago, in order to further competent administration and to promote the welfare of present-day society? The answer is in the negative because in the transition from one viewpoint of the purposes of government to the other, it is not essential that the outward forms of government be modified. The legal fictions of constitutional organization can be retained while the political realities are vitally altered.

"It is above all necessary to keep in view the distinction between its idea or essence and the particular forms in which the idea has been clothed by accidental historical developments or by the notions current at some particular period."³⁹

This is obviously the case in England where the British Crown is no more than a rubber stamp, a titular executive, a king only in name. The outward legal structure of the English government is based on the assumption that the people must be protected against the arbitrary acts of an executive. The internal political structure is framed to suit the predominant idea of administering to the needs of the people. The man versus the state complex is not so much in evidence; the service state is taking the place of the sovereign state. But British constitutional organization has evolved gradually as the objects of gov-

³⁸ Mill, *op. cit.*, 268.

³⁹ *Id.*, 97.

ernment have changed. This evolutionary process is characteristic of most modern constitutions. Said Woodrow Wilson—"Living political constitutions must be Darwinian in structure and in practice."⁴⁰

The history of the origin and growth of the state governments is inseparably linked with the federal Constitution. Consequently, it is necessary to understand the organization of the latter, first, because it was a model for state constitutions, and, second, because the "federal plan" has been adopted as the ideal in the recent state reorganization movement.

There were two ideas of the purpose of government prevailing at the time of the establishment of the federal Constitution of 1787, both of which made the man versus the state complex predominant, and made Montesquieu's tripartite theory acceptable. One was the negative viewpoint of Jefferson that the best government was the least, and the other was the fear of unbridled democracy. The latter fear dominated the members of the Constitutional Convention at Philadelphia, for the echoes of Shay's rebellion were still ringing in their ears. This fear influenced their interpretation of the separation of powers. The framers gave all possible checks and balances in favor of the executive and judiciary in order to weaken the legislative branch, particularly the House of Representatives. The pleas of the adherents of legislative dominance went unheeded. Paine, the advocate of dualism, had no part in the Convention. Behind the doors of the Convention, the democrat, Franklin, and the anti-democrat, Roger Sherman, plead in vain the cause of legislative control. The stand for executive supremacy was frankly stated in the convention by such men as Madison, Hamilton and Morris. Madison saw from experience with the state constitutions that it was not enough merely to state that the powers were separate but that it was necessary to set up checks.⁴¹ Otherwise legislative preponderance would arise. Hence, the President was favored in the following respects at the expense of Congress: First, Congress possessed only specified powers while the President held plenary powers. Second, he was given the veto power. Third, care was taken that no provision of the constitution would indicate that the President was in any way subordinate to Congress and that "his acts were to be as valid as if they proceeded from the legislature."⁴² Fourth, the President retained the patronage power—"the principal source of influence." Fifth, he was selected independent of Congress.

The Method of his selection was one of the chief questions before the Convention. The Randolph resolution had provided for his election by the "National Legislature," but it was evident to certain members that this would give too much influence to the democratic element. Finally, it was decided that his selection by the electoral college would guarantee sufficient independence from public opinion, from the people.⁴³

The President's patronage power was his most important check upon Congress. The framers saw this and did not mince words in

⁴⁰ Woodrow Wilson, *op. cit.*, 56.

⁴¹ *Federalist*, No. 46. See also Nos. 33, 61, 62, 70.

⁴² Statement of Madison; Ford, *Rise and growth of American Politics*, 55.

⁴³ *Federalist*, No. 78.

insisting on this basis for dominating Congress. The statements of Gouverneur Morris are typical. He said, in referring to this appointive power, that it would be possible now for the "loaves and fishes (to) bribe the demagogues."⁴⁴ of the House of Representatives. Although Morris had stated in the Convention that the President was to act as the British minister,⁴⁵ he and the other members of the Convention went to great lengths to assure themselves that Congressional control was not established. In the *Federalist*, however, the President was contrasted to the British king in order to convince the voters of the inferior powers of the American executive.⁴⁶ In reality, he held infinitely greater preponderance than king and cabinet combined.

It was the motive of the framers not only to place the President in complete control of the administration entirely independent of Congress, but, also, to make him in truth the dominant legislative power even though the actual routine enactment was vested in Congress. He was to be responsible for national policy, and this conception of his office was clearly carried out from the start. On one occasion President Jefferson was severely rebuked by Rufus King because he did not assume responsibility for national policy instead of allowing such determination to be made by inexperienced members of Congress.⁴⁷ However, the framers had vested such powers in the President that Congress became a helpless, incoherent, incompetent body. And, when a nationwide demand arose for democratic control of the government, the presidency was sought as the only governmental institution capable of exercising popular will.

Woodrow Wilson, in speaking of this interpretation of the separation of powers declared:

"The main purpose of the Convention of 1787 seems to have been to accomplish this greivous mistake, 'The literary theory' of checks and balances is simply a consistent account of what our constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realites."⁴⁸

Up to the administration of Andrew Jackson, notwithstanding the position given the President by the framers, the House of Representatives held a position in national affairs similar to the British parliament. Although never really as important as the latter, it was considered by far the most important branch of the government.⁴⁹ One reason for this was that popular opinion of the nation at that early period looked askance at the powerful office of the President and saw in the lower house the real source of representation of their desires. The beginning of the Jacksonian era saw a complete revolutionizing of our constitutional structure of more consequence than any constitutional change since the adoption of the Constitution. At this time, the constitutional principle was formulated that the President

⁴⁴ Madison's Journal, July 2.

⁴⁵ Id., July 24.

⁴⁶ Federalist, No. 66.

⁴⁷ Life and correspondence of Rufus King, IV, 481.

⁴⁸ Woodrow Wilson, Congressional government, 285.

⁴⁹ "For the first thirty years it (H. of R.) was the controlling branch of the government."—Benton, Thirty years view.

represented the people as a whole as Congress represented the various portions.⁵⁰ Henceforth, the presidency has been considered the most important representative institution and political organ of the American government. Although once the seat of party authority, the maker and controller of Presidents and administrations, the House of Representatives has sunk into insignificance.

The causes for the President's rise to power at this time are well known. The period is remembered for the beginning of the party nominating convention and the spoils system. Its concomitants were the powerful political machines professional politicians, invisible government, boodle, enormous campaign funds, the wild scramble for victory at the polls, the submergence of vital issues which would divide support, the capitalization of personalities. But this change did not occur without opposition. Clay, Calhoun, and Webster, the statesmen of the day, violently demanded legislative supremacy. According to Webster, "The contest for ages has been to rescue liberty from the grasp of executive power To this end all that could be gained from the imprudence, snatched from the weakness or wrung from the necessities of crowned heads, has been carefully gathered up, secured and hoarded, as the rich treasures, the very jewels of liberty." He referred to the executive as a lion which must be caged" and "our very security depends upon our watchfulness of it. It touches everything, moves everything controls everything."⁵¹ Clay charged that "the power of the President was felt from one extremity to the other of this vast republic. By means of principles which he has introduced and innovations which he has made in our institutions, alas! but too much countenanced by Congress and a confiding people, he exercises uncontrolled the power of the state Myriads of dependants and partisans, scattered over the land, are ever ready to sing hosannas to him, and to laud to the skies whatever he does. He has swept over the government during the last eight years like a tropical tornado. Every department exhibits traces of the ravages of the storm."⁵² Calhoun insisted that Congress was "the great control point where all power must receive its sanction and direction."⁵³

Jacksonian democracy meant the control of the presidency by the political machine. Having this control, the party had nothing to ask of Congress but obedience and subservience. "With the 'legislative caucus' died the last vestige of responsible leadership Every page of our history since the days of Jackson fairly shouts boss rule."⁵⁴ The presidency became the dominant political power, the center of party authority, and the House became the meek servile political agent which it has remained to the present.

The legislative and political powers of the presidency have grown by leaps and bounds. The administrative powers of the President would naturally be supposed to have increased in proportion. On the contrary, in spite of the constant acquisition by the executive department of multifarious functions, the President himself performs few actual administrative activities. Almost the entire

⁵⁰ Message of President Polk, Dec. 5, 1848, Richardson, *Messages and papers of the Presidents*, IV, 664-5.

⁵¹ *Congressional Debates*, Vol. X pt. II, p, 1681 (1834).

⁵² *Id.*, XIII, pt. II, 438, (1837).

⁵³ Merriam, *American political theories*, 180.

⁵⁴ Cleveland and Buck, *The budget and responsible government*, 62.

time of the president is filled by carrying out duties of an honorary or political nature. Even if he were disposed to oversee the operations of the administration he could perform the work only in a most superficial manner because of the enormous and intricate character of the federal administrative services.⁵⁵ If President Washington found it necessary to turn over the administration of the executive departments to his department heads, how much more necessary now. In his classic *Congressional government*, Woodrow Wilson, indicated: "The President is powerful rather as a branch of the legislative than as a titular head of the executive department."⁵⁶ This is true in spite of the fact that he should be part of the administrative rather than the political machinery of government. Since popular government cannot function without the "unqualified obedience" of the executive to Congress, Wilson contended that the President, the cabinet and all other executive officials ought to hold office for an indefinite tenure. "It is a positive disadvantage that (the department heads) should be chosen upon such a principle (of spoils)." They should be "permanent officials separated from partisan conflicts of politics."⁵⁶ Although the details of the relations of chief executives to cabinet members will be considered elsewhere, it is essential to realize that the state reorganization adherents run directly contrary to these fundamentals in their advocacy of the selection of the important officials in the civil service on the basis of political partisanship.

All political observers do not agree that the President occupies a dominant if not dictatorial position in American government. Gamaliel Bradford, for example, in his two lengthy volumes upon *The lessons of popular government*, has taken the attitude that the source of the evils in the federal government is the encroachment of Congress upon the executive.

"It has been observed that while presidential elections as a whole are tending to raise the character of the people, other influences are tending even more particularly to drag it down. These may be summed up from a political point of view in the anarchy resulting from the suppression of executive power and the absorption of all government by the legislature, a force which is certain in the long run, unless some stand is taken against it to assert its superiority over all others."⁵⁷

To be sure Congress possesses a vestige of power over the President but only a vestige. Such power as it has must be manifested through one of its two main functions—the "informing function" and the "legislative function." Of these two the "informing function" is the more vital in popular government. Yet "there is no similar legislature in existence which is so shut up to the one business of law making as is our Congress." Hence, Congress should not be censured too severely, when it "fails to check evil courses on the part of the executive," because "they have been denied the means of

⁵⁵ Woodrow Wilson, *op. cit.*, 260.

⁵⁶ *Id.*, 260.

⁵⁶ *Id.*, 267-8: "Party government can exist only when the absolute control of administration, the appointment of its officers as well as the direction of its means and policy, is given immediately into the hands of that branch of the government whose power is paramount, the representative body."

⁵⁷ Bradford, *The lessons of popular government*, 381.

doing so."⁵⁸ The President has no fear of such powers as impeachment, control of the purse, and investigative authority. It has been recognized since Jefferson's time that "impeachment is not even a scarecrow." Congress, being unable to control the acts of the executive, attempts to lay down the details of administration in the laws. Thus it may hamper the administration by enacting legislation which goes into great detail in setting forth the duties of the officials, by minutely itemizing appropriation bills, and stating exact salaries of employees. It may conduct partisan investigations and hold sensational hearings in hopes of subduing political opponents or of turning public opinion against the executive and his administration to such a degree that "the rascals would be turned out" at the next election. Indeed, if the corruption is sufficiently flagrant and nauseating, the investigating committees may arouse public indignation to such a pitch that the President will compromise his position by removing the guilty from office. But the "limitations and insufficiency" of such inquisitorial powers are manifest.⁵⁹

Not only is the President unafraid of the "informing function" of Congress, but he has even less fear of the "legislative function" because he commands party policy. Those who denounce Congressional encroachments upon the executive recall the statement of Madison in the Federal Convention and his remarks in the *Federalist*.⁶⁰ But Madison was not reckoning with political parties, and when the parties concentrate most of their energies on the conduct of the executive department his argument falls to the ground. The veto power and the Supreme Court's authority to declare laws unconstitutional are only negative checks, while the patronage power, the party whip and caucus are positive instruments making the presidency paramount and Congress impotent. This is not all. When the President finds laws not to his liking, he need not enforce them or he may appoint administrators who will not execute them in accordance with the will of Congress. This presidential practice of "boring from within" has gone to such lengths that members of Congress instrumental in the passage of the laws in question have actually advocated their repeal.

It is this all-powerful nature of the office, not the strenuous personality of the incumbent, that makes the presidency the supreme force. President Wilson who was denounced as dictator, could have dominated the scene from no other position. The self-denying Taft moulded Congress to suit his will. "And how the legislative department has stammered and grown incoherent under the leadership of normalcy and common sense."⁶¹ If we can make any conclusions from the past it is that there will be no accession of supermen to the office of President, yet this is the only path under present institutions to secure anything approaching popular control of administration. "We secure Caesars by accident, their tenure is not determined by quality. The development of alternative connections is the prime constitutional

⁵⁸ Wilson, *op. cit.*, 297-8, 302, 303.

⁶⁰ Bradford, *op. cit.*, 383.

⁶¹ Jenks, "Control of administration by Congress," *American Review*, II, 596. (See also Ford, *op. cit.*, 284: "The rise of presidential authority cannot be accounted for by the intention of the Presidents; it is the product of political conditions which dominate all departments of government so that Congress itself shows an unconscious disposition to aggrandize the presidential office.")

necessity of the time."⁶² Until the remedy of direct responsibility of the executive to the representative body is established, the present inefficient and crude method of congressional investigation must continue as the only existing solution for an otherwise unendurable situation. When it is realized further that, through the force of social conditions, more and more policy determining powers must be placed in the hands of the administration, that a movement is on foot to muzzle the Senate, and that a recent Supreme Court decision has divested the Senate of its control of removals from office, it will become evident that congressional usurpation is just another political bogey.

Although there are a few observers such as Bradford that warn against the threat of congressional supremacy, the majority recognize the reality of legislative impotence. Is it not significant that experienced statesmen who have watched the workings of the presidency at close range have most strenuously attested its preponderance? John Quincy Adams remarked "that the powers of the executive department, explicitly and emphatically concentrated in one person, are vastly more extensive and complicated than those of the legislature."⁶³ According to Secretary Seward, "We elect a king for four years and give him absolute power within certain limits which after all he can interpret for himself."⁶⁴ President Hayes declared, "Practically, the President holds the nation in hand."⁶⁵

Some distinguished statesmen have from time to time endeavored to secure legislative control over the President but without avail. Roger Sherman's efforts in the Federal Convention were fruitless. In 1833, Justice Story wrote: "If corruption ever eats its way silently into the vitals of this republic, it will be because the people are unable to bring responsibility home to the executive through his chosen ministers."⁶⁶ He urged, with no results, that, if the English system of ministerial responsibility was not applied in principle, an attempt should be made to approach it as nearly as possible by making cabinet members ex-officio members of the House. In 1864-5, an effort was made to pass a bill in the House for the purpose of securing seats in Congress for cabinet members, and a similar bill in 1879-82 was considered in the Senate by a committee including among others James G. Blaine, O. H. Platt and Geo. H. Pendleton.⁶⁷

Further historical evidence as to the ascendancy of the President seems hardly necessary. Under the administration of Cleveland and Roosevelt, the greatest exercise of this authority occurred. When, during the latter administration, the big stick was swung ruthlessly, not another political force was in sight. But, in Wilson's administration, the nearest approach to dictatorship under modern popular government was reached. Senator Work spoke of the Wilson government as follows:

"I come now to comment on what I consider one of the most important questions that are confronting Congress today, if not the most important of them all, and that is the

⁶² Jenks, *op cit.*, II, 602; Mill, *op cit.*, 270.

⁶³ J. Q. Adams, *Discourse on the jubilee of the Constitution.*

⁶⁴ Ford, *op cit.*, 291.

⁶⁵ Stevens, *Sources of the Constitution*, 167-79.

⁶⁶ Story, *On the Constitution*, sec. 869.

⁶⁷ Senate Report No. 837, 46 Cong., 3 Sess., (Feb. 4, 1881).

evident purpose of the executive to dominate the legislative branch of the government. I have had occasion to speak of it before and since this administration came into power. It was bad enough under previous administrations but in this one it has increased a hundred fold over anything that has been known in the past. This dominating influence has become so insistent and continuous and has been submitted to so slavishly by the majority of Congress, that the independence and usefulness of the legislative branch of government are both threatened. It has been so asserted and exercised and obediently submitted to that we have come perilously near a dictatorship. The President has not contented himself by advising what measures should be considered by Congress and vetoing them if they do not meet his approval as the Constitution authorizes him to do. He has demanded that certain legislation shall be enacted, has insisted that Congress remain in session until the laws he insists upon are enacted and the secret caucus is made the instrument with which to enforce his will. As a consequence we have laws on the statute books that are in effect and in reality executive orders and not legislative acts. They are legislation of and enacted by the executive department and not by Congress."⁶⁸

One modern authority closed his study of the presidency with the statement: "American democracy has revived the oldest political institution of the race, the elective kingship That the people have been able to accomplish this with such defective apparatus, and have been able to make good a principle which no other people have been able to reconcile with the safety of the state, indicates the highest degree of constitutional morality yet attained by any race."⁶⁹

In spite of this formidable evidence showing presidential supremacy and irresponsibility to the representative body to be a fact, the advocates of state reorganization have adopted this "federal plan" as their model and ideal because they supposed it would enforce the responsibility of the governor.

The establishment of the "federal plan" in 1789 effected a marked departure from the orthodox principles of constitutional organization existing in the various states. Up to that time, legislative supremacy was the ruling type. The experiences of the colonial legislatures with the royal governors had determined to a great extent the mould of the political institutions when the colonies secured their independence. The colonists had no voice in the selection of the colonial governor who exercised an effective veto over popular will as expressed in the representative assembly. Hence, in the early constitutions, the very natural jealousy of the governor was shown.⁷⁰ His complete subordination to the legislature was insured through his selection by that body,⁷¹ through his sharing the executive power with the executive council and the upper house and through the appointment of the

⁶⁸ Congressional Record, 63 Cong., 2 Sess., 4402, (Mar. 6, 1914).

⁶⁹ Ford, *op cit.*, 293.

⁷⁰ Federalist, No. 46 Finley and Sanderson, *American executives and executive methods*, 43.

⁷¹ Mass., New York, R. I., and Conn. were exceptions to this general practice.

executive council and most of the important executive officers by the legislature.

This was all changed with the adoption of the Federal Constitution. The prevailing type of direct executive responsibility to the representative body was cast aside and in its place came the "federal plan" of executive independence and irresponsibility to the legislature. "The influence of the federal example was immediate."⁷² The selection of the governor was transferred from the legislature to the electorate. The executive council was abolished. The appointive power rapidly passed from the hands of the legislature to the governor.

The effect of this change upon the status of the State Legislature was identical with the effect upon Congress of the popular selection of the President. There should be no surprise in finding that henceforth the State representative assembly assumed a position of insignificance. There was a proportionate growth of popular distrust of the legislature. This development was natural because representative assemblies invariably sink in character and competency when separated from the executive. In the eyes of the people at large the legislature appeared no longer to be their trusted representative and protector. It was shorn of practically all of its prestige and power and the governor became the dominant political and representative institution. As the legislature lost power the political parties gained power and it became their great aim in the State as in the federal sphere to secure the election of the chief executive. All energies were bent upon the election of the governor. The election of the representatives in the state legislature was of little significance in comparison. Having elected the governor, the real political head and representative of the people as a whole, the parties found means of throttling any opposition of individual members of the legislature. Such maneuvers were justified on the basis that the governor had a mandate from the country. Through the party bosses, the secret party caucus, gag rule, lobbying, logrolling, spoils and patronage, all opposition and insurgency was easily muzzled, and regularity and conformity with executive policy was enforced. Such political conditions as these were ripe for the development of a system controlled by bosses, professional politicians and invisible party machines. Consequently, the experience of the state government bears out the general maxim of comparative government, that executive supremacy goes hand in hand with powerful political machines and bosses. Indeed, if it were not for such invisible government this type of government would be unworkable.

"It is a distinct gain to public order, when no constitutional provision exists for associating the legislative process with administrative knowledge and intelligence, that private enterprise steps in to provide a refuge from chaos. The escape of the United States from the ruin which is the usual fate of constitutions that separate the executive management from direct contact with the assembly, is doubtless to

⁷² Finley and Sanderson, *op cit.*, 44; (Merriam, *op cit.*, 183, does not agree that executive supremacy started in federal government).

be attributed to the way in which its politics have been commercialized." ⁷³

The governor's administrative as contrasted with his political activities have not increased to any considerable degree although the state administrative services have grown enormously. This is owing to his extensive political, titular and honorary duties, the practice of popular election of many state executive officers, and the establishment of independent boards and commissions which relieve him from much administrative responsibility. The outstanding conditions leading to the popular election of an increasing number of executive officials was undoubtedly the popular revolt of the people against the bosses and the invisible party machine with its spoils and patronage. It was not realized that lengthening the ballot would only make the machine and the boss more necessary and more powerful. The prestige of the federal constitution precluded the extension of this movement to the federal government.

The impotence of the governor as an administrative official is attested upon every hand.

"Originally occupying about the same relative position as the President, the governor has been stripped of his administrative power and confined to the exercise of political powers. . . . It has become impossible for the governor to become the head of the commonwealth administration because the people have decided that he shall be in the main a political officer. They have lessened his power of appointment. They have almost destroyed his power of removal. He has been unable to develop any power of direction. The governor's office has been deprived of all means of administrative development." ⁷⁴

Recently efforts have been made to restore the governor to his original status as it was under the true "federal plan." The effort to make him once again the only elected executive officer is known as the short ballot movement. (It is not the aim of this movement to shorten the ballot to the extent of making the chief executive appointive in the municipal state or federal sphere.) The effort to abolish all independent commissions in order to make the governor solely responsible is known as the state reorganization movement. But even had the governor full administrative powers and responsibility, had been relieved of the titular and political duties of the office, and was a thoroughly competent administrator (qualifications conspicuously lacking in any popularly elected official), he would still be unable to direct the administration in any more than a superficial manner because of the enormity and intricacy of the administrative services.

It is in accord with the fundamental philosophy of government and with the experience under the U. S. "federal plan" to conclude that as long as the governor remains a popularly elected official independent of the legislature, it is not only inevitable but it is desirable that he occupy the following status: He will be the supreme political power of the government. He will be maintained in power by the

⁷³ Ford, *Representative government*, 240.

⁷⁴ Goodnow, *Comparative administrative law*, 81. President's administrative functions *supra*, 21.

force of invisible bosses and party spoils. He will bear no real responsibility for administrative operations. To the extent that the recent state reorganization movement, which accepts the "federal plan" as its ideal, has endeavored to alter this status, it has failed and will continue to fail. The teachings of political philosophers for ages past convict the reorganization scheme as false. The lessons of a century under the "federal plan" denies the validity of its promise.

(To Be Continued)